AMERICAN INTERNATIONAL ASSURANCE BHD A

v.

COORDINATED SERVICES L DESIGN SDN BHD

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
RAMLY ALI JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-(IM)(NCC)-766-2010]
23 JUNE 2010 C

COMPANY LAW: *Winding up - Stay of order - Stay order contained order validating all dealings and agreements of company from date of winding up until date of stay order - Whether validation order effectively rescinded or discharged winding up order perpetually - Whether ultra vires Companies Act 1965 and Companies (Winding-Up) Rules 1972 thereunder - Whether order validated void dealings entered into by company after winding up - Whether directors after winding up could enter into dealings for benefit of company - Companies Act 1965, ss. 223 & 243(1)* D E

About seven months after the respondent ('CSLD') was wound up by order of court, the directors of the company obtained a commercial fire insurance policy from the appellant ('AIA'), a licensed insurance company, which did not know about the winding up. During the validity period of the insurance policy, a fire occurred at CSLD's premises and the company made a claim under the policy. When the AIA-appointed loss adjusters investigating the claim discovered that CSLD had been wound up, AIA repudiated the policy. About five years after the repudiation and unknown to AIA, CSLD applied for and obtained a stay order of the winding up ('the stay order'). The stay order had two limbs, *ie,* the first was a perpetual order to stay altogether the winding up order while the second limb was an order that validated all dealings and agreements entered into by CSLD from the date of the winding up order until the date of the stay order. This had the effect of validating AIA's commercial fire insurance policy which was void as the policy was not obtained by the liquidators of CSLD but by the directors of the company. On being served with the stay order, AIA filed an originating summons to set aside the stay order on the ground that it breached F G H I

A s. 243(1) of the Companies Act 1965 ('the Act') and/or was made in excess of and/or without jurisdiction of the winding up court and was therefore null and void.

AIA argued that (i) the second limb of the stay order was *ultra* B *vires* s. 243 of the Act and beyond the jurisdiction of the winding-up court as it amounted to an indirect complete discharge of the winding up order (ii) CSLD should have notified AIA of its intention to obtain the stay order as it affected AIA's position on the repudiation of the fire insurance policy and (iii) the directors C of CSLD had no power to enter into a fire insurance policy with AIA after its winding up. In reply, CSLD maintained that the court had jurisdiction to grant the stay order and that no injustice had been caused to any creditor, shareholder or the public. It said that AIA's motive to set aside the order was simply to evade D liability under the fire insurance policy.

The High Court dismissed AIA's originating summons holding, *inter alia*, that (i) the act of CSLD or its directors taking the fire insurance policy from AIA after the winding up was for the E benefit of the company and therefore it must be validated (ii) the stay order was made within the power and jurisdiction of the winding up court and (iii) the second limb of the stay order was necessary to ensure that all transactions after the winding up had commenced were duly validated to prevent them from being F challenged.

Held (unanimously allowing the appeal with RM10,000 costs, affirming the first limb of the stay order and setting aside the second limb of the order)
Per Ramly Ali JCA:

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(1) The second limb of the stay order had the effect of rescinding or discharging totally the winding up order perpetually, as if the winding up order had never been made. The Companies Act 1965 or the Companies (Winding-Up) Rules 1972 made H no express provision enabling the court to make such an order. The second limb could not be allowed to stand as the effect on commercial reality was adversely far-reaching. (paras 22 & 32)

I **(2)** The judge had power under s. 243 of the Act to grant a perpetual stay order of the winding up, but not the power to validate all dealings and agreements entered into by the company from the date of the winding up order until the date of the stay order. (para 41)

(3) In granting a stay order under s. 243(1) of the Act the court may impose terms and conditions as it thought fit. But any term and condition imposed must not defeat the purpose of the order itself. (para 31)

(4) A stay order under s. 243 of the Act took effect from the date of pronouncement of the order and not from the date of the winding up order. A stay did not wipe out the winding up order from existence. The question of validating all dealings and agreements entered into after the date of the winding up order until the date of the stay order, as was done in this case, did not arise at all. (para 23)

(5) The respondent had, through the second limb of the stay order, validated the fire insurance policy which was void as the policy was not obtained by the liquidator but by the directors. This was clearly not what s. 243 of the Act envisaged. (para 33)

(6) From the date of the winding up order until the date of the stay order, the affairs of the company were in the hands of the liquidator. No one but the liquidator could act for the company. (paras 24 & 25)

Bahasa Malaysia *Translation Of Headnotes*

Kira-kira tujuh bulan selepas responden ('CSLD') digulungkan melalui perintah mahkamah, pengarah-pengarah syarikat telah memperolehi satu polisi insurans kebakaran komersial daripada perayu ('AIA'), sebuah syarikat insurans berlesen, yang tidak mengetahui mengenai penggulungan tersebut. Semasa tempoh sah polisi insurans tersebut, satu kebakaran telah berlaku di premis CSLD dan syarikat tersebut telah membuat tuntutan di bawah polisi itu. Apabila ajuster kerugian lantikan AIA yang menyiasat tuntutan itu mendapati bahawa CSLD telah digulungkan, AIA membatalkan polisi itu. Kira-kira lima tahun selepas pembatalan dan tanpa diketahui oleh AIA, CSLD telah memohon untuk dan mendapat satu perintah penggantungan bagi penggulungan itu ('perintah penggantungan'). Perintah penggantungan itu mempunyai dua cabang, iaitu, pertama adalah satu perintah kekal untuk menggantungkan semua perintah penggulungan manakala cabang kedua adalah perintah untuk mengesahkan semua urusan dan perjanjian-perjanjian yang telah dimasuki oleh CSLD dari tarikh

perintah penggulungan sehingga tarikh perintah penggantungan. Ini mempunyai kesan mengesahkan polisi insurans kebakaran komersial AIA yang telah terbatal kerana polisi itu tidak diperolehi oleh likuidator-likuidator CSLD tetapi oleh pengarah-pengarah syarikatnya. Dengan penyampaian perintah penggantungan, AIA telah memfailkan satu saman pemula bagi mengenepikan perintah penggantungan tersebut atas alasan bahawa ianya telah memungkiri s. 243(1) Akta Syarikat 1965 ('Akta') dan/atau telah dibuat melebihi dan/atau tanpa bidang kuasa mahkamah penggulungan dan oleh itu adalah batal dan tidak sah. AIA berhujah bahawa (i) cabang kedua perintah penggantungan adalah *ultra vires* s. 243 Akta dan melebihi bidang kuasa mahkamah penggulungan kerana ianya merupakan satu pelepasan penuh secara tidak langsung perintah penggulungan (ii) CSLD sepatutnya telah memaklumkan AIA mengenai niatnya untuk memperolehi perintah penggantungan memandangkan ianya mempunyai kesan terhadap kedudukan AIA terhadap pembatalan polisi insurans kebakaran dan (iii) pengarah-pengarah CSLD tidak mempunyai kuasa untuk memasuki insurans polisi kebakaran dengan AIA selepas penggulungannya. Sebagai balasan, CSLD kekal bahawa mahkamah mempunyai bidang kuasa untuk memberi perintah penggantungan dan bahawa tiada ketidakadilan yang disebabkan kepada mana-mana pemiutang, pemegang saham atau orang awam. Ia mengatakan bahawa motif AIA untuk mengenepikan perintah itu adalah untuk mengelakkan liabiliti di bawah polisi insurans kebakaran tersebut.

Mahkamah Tinggi telah menolak saman pemula AIA dengan memutuskan, antara lain, bahawa (i) kelakuan CSLD atau pengarah-pengarahnya dengan mengambil polisi insurans kebakaran daripada AIA selepas penggulungannya adalah untuk manfaat syarikat dan oleh itu, ia mesti disahkan (ii) perintah penggantungan telah dibuat dalam kuasa dan bidang kuasa mahkamah penggulungan dan (iii) cabang kedua perintah penggantungan adalah perlu untuk memastikan supaya kesemua transaksi-transaksi selepas penggulungan dimulakan telah disahkan bagi mengelakkannya daripada dicabar.

Diputuskan (sebulat suara membenarkan rayuan dengan kos RM10,000; mengesahkan perintah penggantungan cabang pertama dan mengenepikan perintah cabang kedua)
Oleh Ramly Ali HMR:

(1) Cabang kedua perintah penggantungan mempunyai kesan pembatalan atau pelepasan sepenuhnya perintah penggulungan secara kekal, seolah-olah tiada perintah penggulungan dibuat.

Akta Syarikat 1965 atau Kaedah-Kaedah (Penggulungan) Syarikat 1972 tidak mempunyai peruntukan nyata bagi membolehkan mahkamah membuat perintah sebegitu. Cabang kedua tidak boleh dibenarkan untuk berdiri kerana kesannya terhadap kebenaran komersial adalah mendalam.

(2) Hakim mempunyai kuasa di bawah s. 243 Akta untuk memberi perintah penggantungan kekal bagi penggulungan, tetapi tiada kuasa untuk mengesahkan semua urusan-ururan dan perjanjian-perjanjian yang dimasuki oleh syarikat dari tarikh perintah penggulungan sehingga tarikh perintah penggantungan.

(3) Dalam membenarkan perintah penggantungan di bawah s. 243(1) Akta, mahkamah boleh mengenakan terma-terma dan syarat-syarat seperti yang difikirkan patut. Tetapi, sebarang terma dan syarat yang dikenakan tidak boleh menjejaskan kehendak perintah itu sendiri.

(4) Suatu perintah penggantungan di bawah s. 243 Akta berkuatkuasa dari tarikh perisytiharan perintah itu dan bukannya dari tarikh perintah penggulungan. Suatu penggantungan tidak boleh menghapuskan perintah penggulungan itu daripada kewujudannya. Persoalan berkenaan pengesahan kesemua urusan-urusan dan perjanjian-perjanjian yang dimasuki selepas tarikh perintah penggulungan sehingga tarikh perintah penggantungan, seperti yang telah dibuat dalam kes ini, tidak berbangkit sama sekali.

(5) Responden telah, melalui cabang kedua perintah penggantungan, mengesahkan polisi insurans kebakaran yang terbatal memandangkan polisi itu tidak diperolehi oleh likuidator tetapi oleh pengarah-pengarah. Ini dengan jelasnya bukan kehendak s. 243 Akta.

(6) Dari tarikh perintah penggulungan sehingga tarikh perintah penggantungan, urusan-urusan syarikat telah berada dalam tangan likuidator. Tiada sesiapa tetapi likuidator yang boleh bertindak bagi syarikat.

Case(s) referred to:

Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd [2004] 7 CLJ 409 ***(refd)***

Brinds Ltd v. Offshore Oil NL (No: 2)[1985] 10 ACLR 232 ***(refd)***

BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd & Another Action [1996] 1 LNS 63 HC ***(refd)***

A *Krextile Holdings Pty Ltd v. Widows [1974] VR 689* ***(refd)***
Mc Ausland v. Deputy Commissioner of Taxation [1993] 118 ALR 577 ***(refd)***
Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 1 LNS 89 FC ***(refd)***
B *Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd [1995] 1 LNS 308 HC* ***(refd)***
Re Baxters Ltd [1898] WN 60 ***(refd)***
Re Intermain Properties Ltd [1986] BCLC 265 ***(refd)***
Re Kim Maxwell Ltd [1992] 1 NZLR 69 ***(refd)***
Re Red Gold Mining Co [1950] Que KB 47 ***(refd)***
C *Rofa Sport Management AG v. DHL International (UK) Ltd [1989] 1 WLR 902* ***(refd)***
Shree Chamundi Mopeds Ltd v. Church of South India Trust Association [1992] 3 SCC 1; ALR 1992 SC 1439 ***(refd)***
Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436 SC ***(refd)***
D *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim [1997] 2 CLJ 315 CA* ***(refd)***
Vengadasalam v. Khor Soon Weng & Ors [1985] 1 LNS 46 SC ***(refd)***
Vijayalakshmi Devi Nadchatiram v. Jegadevan Nadchatiram & Ors [1995] 2 CLJ 392 CA ***(refd)***

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Legislation referred to:
Companies Act 1965, ss. 223, 236(1)(a), 243(1), 253
Rules of the High Court 1980, O. 92

Companies Act 1961 [Aust], s. 243(1)
F Companies Act 1985 [Aust], s. 383
Corporations Act 1989 [Aust], ss. 482, 483
Insolvency Rules 1986 [UK], r. 7.47(1)

Other source(s) referred to:
Ford, *Principles of Company Law*, 5th edn, 1990, para 2207, p 770
G Jowitt, *Dictionary of English Law*, 2nd edn, pp 1701-1702

For the appellant - CK Yeoh; M/s Ranjit Singh & Yeoh
For the respondent - Hargopal Singh; M/s Hargopal Singh & Co

[Editor's note: For the High Court judgment, please see American International
H *Assurance Bhd v. Coordinated Services L Design Sdn Bhd [2010] 1 LNS 200]*

Reported by Ashok Kumar

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JUDGMENT

Ramly Ali JCA:

[1] This is an appeal against the decision of the learned High Court judge dated 24 February 2010 dismissing the appellant's application *vide* an originating summons dated 19 November 2009 to set aside the order for stay of winding-up of the respondent obtained by the respondent on 27 April 2009.

[2] By the said originating summons, the appellant was seeking *inter alia* for a declaration that the stay order dated 27 April 2009 obtained by the respondent at the Kuala Lumpur High Court Winding-Up No: D1-22-86-2001 was obtained in breach of s. 243(1) of the Companies Act 1965 and/or in excess of and/or without jurisdiction of the winding-up court and is therefore null and void. As a consequence of the declaratory relief sought the appellant was seeking for an order that the said stay order dated 27 April 2009 be set aside.

[3] The said originating summons was dismissed by the High Court on 24 February 2009. Hence the present appeal.

Factual Background

[4] The appellant is a licensed insurance company. On 10 May 2002, the respondent obtained an insurance policy from the appellant known as a Commercial Fire Insurance Policy No: 1550011620. The said fire policy was initially for a period of 10 May 2002 to 9 May 2003. It was obtained through the director or servant of the respondent. It was not obtained by the liquidator. Upon expiry of the said policy on 9 May 2003, the respondent renewed it with the appellant for a further period of 10 May 2003 to 9 May 2004.

[5] On 4 April 2004, a fire occurred at the respondent's premises and the respondent made a claim under the said policy.

[6] During the investigation of the respondent's claim by a loss adjuster appointed by the appellant, it was discovered that the respondent had been wound up on 23 October 2001. The appellant then repudiated the said policy *vide* letters dated 1 December 2004 and 13 December 2004. By reason of the repudiation the appellant attempted to refund the insurance premium paid by the respondent under the policy. The respondent refused to accept the refund and threatened to institute legal proceedings against the appellant.

[7] Unknown to the appellant, the respondent filed a notice of motion dated 10 March 2009, and on 27 April 2009, obtained an order to stay the winding-up order permanently and that all dealings and agreements entered into by the respondent from the date of the winding-up (23 October 2001) till the date of the stay order (27 April 2009) be validated. The stay order was served on the appellant on or about 14 August 2009. On 19 November 2009 after obtaining and retrieving all the necessary cause papers, the appellant filed the present originating summons on 19 November 2009.

The Appellant's Arguments

[8] The salient part of the stay order dated 27 April 2009, states as follow:

> ... ADALAH DIPERINTAHKAN bahawa Perintah Penggulungan terhadap Syarikat Responden bertarikh 23hb Oktober 2001 digantung sama sekali dan bahawa segala urusniaga dan perjanjian-perjanjian yang telah dimasuki oleh syarikat Responden dari tarikh penggulungan, iaitu 05hb Februari 2001 sehingga tarikh Perintah ini disahkan.

[9] The appellant contended that the second limb of the stay order ie, "segala urusniaga dan perjanjian-perjanjian yang telah dimasuki oleh syarikat responden dari tarikh permulaan penggulungan iaitu 5 Februari 2001 sehingga tarikh perintah ini disahkan" amounts to an indirect complete discharge of the winding-up order which the winding-up court has no jurisdiction to do so. The appellant further submitted that the stay order should be set aside on the grounds that it was obtained in breach of and *ultra vires* s. 243(1) of the Companies Act 1965; and beyond the jurisdiction of the winding-up court. The appellant claimed that it had no notice of the stay order until it was served on the appellant on 14 August 2009 by the respondent's solicitors. The appellant contended that the respondent should have given notice to the appellant with regards of intention to obtain such order as the said stay order affects the fire policy and the position taken by the appellant to repudiate it. The appellant further contended that the residual powers of the respondent's directors after it was wound up is only to bring an appeal in the name of the company against the winding-up order; and the directors had no power to enter into a fire insurance policy with the appellant.

The Respondent's Arguments

[10] The respondent on the other hand argued that the stay order in question was granted within the jurisdiction of the court and no injustice has been caused to any creditor, shareholder or the public. That being so, it should remain undisturbed. To the respondent, the only purpose of the appellant's application in the present case is to evade its liability under the fire insurance policy.

[11] The respondent further submitted that the court has the jurisdiction to validate all dealings and agreements entered into after the commencement of winding-up of the company and to grant a perpetual stay. The respondent agreed with and supported the findings of the learned judge that "the said order cannot be said to be in excess of jurisdiction as it is a necessary order to ensure that all transactions after the winding-up process has commenced are duly validated, failing which, all steps taken in the course of the winding-up proceedings will be a subject of challenge."

Decision Of The High Court Judge

[12] The learned High Court judge noted that the appellant in making the application was to evade liability in respect of the fire policy. He further held that just because a company had been wound up does not mean any of the transaction during the material time or after the winding-up cannot be sustained; it depends on whether the act was for the benefit of the company which was essential in the process of winding-up. In the present case, the judge held that the act of taking a fire insurance policy by the company or its directors after the company was wound up was for the benefit of the company and therefore must be validated.

[13] The learned judge also held that the stay order was made within the power and jurisdiction of the winding-up court; and the second limb of the said order cannot be said to be in excess of jurisdiction as it is a necessary order to ensure that all transactions after the winding-up process has commenced are duly validated, failing which all steps taken in the course of winding-up proceedings would be subject to challenge. The judge was of the view that the terms of the stay order are one essential within the parameters of the company's transactions.

A **Findings Of This Court**

[14] Under s. 243(1) of the Companies Act 1965, the court is empowered at any time after an order for winding-up has been made, on the application of the liquidator, or of any creditor or
B contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding-up ought to be stay, to make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the court thinks fit.

[15] Under the said s. 243(1), the court has no power to set
C aside, discharge or rescinds the winding-up order, but only to stay the winding-up order either altogether or for a limited time upon terms the court thinks fit. "Stay" must be distinguished from "setting aside", "discharge" or "rescind". A winding-up order could not be discharged or rescinded after it had been made. The only
D remedy is to apply for stay of the proceedings (see: *Re Baxters Ltd* [1898] WN 60; *Vijayalakshmi Devi d/o Nadchatiram v. Jegadevan s/o Nadchatiram & Ors* [1995] 2 CLJ 392; *Brinds Ltd v. Offshore Oil NL (No: 2)* [1985] 10 ACLR 232; and Ford, *Principles of Company Law,* 5th edn., 1990 para. 2207 at p. 770).
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[16] In two Jowitt's *Dictionary of English Law*, 2nd edn., at pp. 1701-1702, "stay" can mean "a total discontinuance of an action … but in strictness it is only accurate when a decree or judgment has been given, for in such a case the suit or action
F cannot be dismissed, because the court has adjudicated on it, and therefore all that can be done is to stay proceedings under the decree or judgment."

[17] The Companies Act 1965 and the Companies (Winding-Up)
G Rules 1972 make no express provision enabling the court to set aside, or discharge or rescind a winding-up order after it has been made and perfected. The scheme of the Act and the rules is such that an aggrieved party may appeal against the winding-up order under s. 253 of the Act, or apply to stay the proceedings under
H s. 243 of the Act either altogether or for a limited time under terms and conditions which the court thinks fit (See: *Sri Hartamas Dvpt Sdn Bhd v. MBf Finance Bhd* [1991] 3 CLJ 2078; [1991] 1 CLJ (Rep) 436; *Perdana Merchant Bankers Bhd v. Maril Rionebel (M) Sdn Bhd* [1995] 1 LNS 308 and *Vengadasalam v. Khor Soon*
I *Weng & Ors* [1985] 1 LNS 46).

[18] A stay order under s. 243 of the Companies Act 1965 takes effect from date of pronouncement of the stay and not from the date of the winding-up order. Therefore a stay does not wipe the winding-up order from existence but would only be operative from the date of the passing of the stay order.

[19] The effect of an order staying winding-up proceedings is that the winding-up order becomes inoperative without being revoked. (see: *Krextile Holdings Pty Ltd v. Widows* [1974] VR 689 at p. 694). Proceedings are not ended by a stay though nothing can be done to pursue them without further court order. (See: *Rofa Sport Management AG v. DHL International (UK) Ltd* [1989] 1 WLR 902). Tipping J, in *Re Kim Maxwell Ltd* [1992] 1 NZLR 69 once said that "a permanent stay amounts in reality to a contradiction in terms: the winding-up remains but is permanently stayed". In other words, the effect of a stay order is that the winding-up process comes to an end – the whole effect of the winding-up ceases and the company can thereafter resumes the conduct of its business and affairs as if no winding-up order existed. (See: *Krextile Holdings Pte Ltd v. Widdows (supra)*; *The Law of Company Liquidation*, 4th edn. by Andrew R Keay).

[20] In the present case, the stay order dated 27 April 2009 granted by the learned High Court judge has two limbs, namely:

a) perpetual order to stay altogether the winding-up order made on 23 October 2001 (the first limb); and

b) validation order to validate all dealings and agreements entered into by the company from the date of the winding-up order (23 October 2001) until the date of the stay order (27 April 2009), (the second limb).

[21] The learned judge held that just because a company had been wound up does not mean any of the transaction during the material time or after the winding-up cannot be sustained … it depends on whether the act is for the benefit of the company which is essential in the process of winding-up. In this case, the learned judge held that the act of taking a fire insurance policy by the company or directors after the company was wound up is for the benefit of the company.

[22] This court cannot agree with the learned judge on this issue ie, the second limb of the stay order. The Companies Act 1965 or the Companies (Winding-Up) Rules 1972 make no express provision enabling the court to make such an order. In *Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 1 LNS 89, the company had been ordered to be wound up on a contributory's petition. About 18 months after the winding-up order was made, all members realized that the break-up of the valuable assets of the company was a financial disaster for them and they asked for a stay of proceedings and for reversal of the liquidator's sales which were made during the winding-up process and had nearly been completed. Abdoolcader J refused to interfere with the liquidator's sale because this would be a breach of commercial morality and refused to order stay of winding-up proceedings as requested.

[23] There are strings of authorities to show that a stay order takes effect from the date of pronouncement of the order and not backdated to the date of the winding-up order. A stay order does not wipe the winding-up order out of existence but would only be operative from the date of the granting of the stay order. Therefore the question of validating all dealings and agreements entered into after the date of the winding-up until the date of the stay order (as being done be the learned judge in the present case and described by Abdoolcader J as against the principles of commercial morality) does not arise at all. (See: *Vijayalakshmi Devi v. Jeyadern (supra)*; *BSN Commercial Bank (M) Bhd v. River View Properties Sdn Bhd & Another Action* [1996] 1 LNS 63; *Perdana Marchant Bankers Bhd v. Maril Rionabel (M) Sdn Bhd (supra)*; *Mookapillai & Anor v. Sri Saringgit Sdn Bhd (supra)*; *Mc Ausland v. Deputy Commissioner of Taxation* [1993] 118 ALR 577).

[24] During the winding-up process ie, from the date of the winding-up order until the date of the stay order, the affairs of the company were in the hands of the liquidator properly appointed by the court in accordance with the powers conferred by the Companies Act 1965 (particularly s. 236 of the Act).

[25] It is trite law that once a company is wound up, the board of directors of the company becomes *functus officio*. The liquidator displaces the directors and the control of the activities of the company is vested with the liquidator. No one but the liquidator can act for the company. The directors however have the residual

powers to bring an appeal against the winding-up order (see: *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd (supra)*; *Taman Sungai Dua Development Sdn Bhd v. Goh Boon Kim* [1997] 2 CLJ 315; *Abric Project Management Sdn Bhd v. Palmshine Plaza Sdn Bhd* [2004] 7 CLJ 409).

[26] When a winding-up order is made, the directors of the company remain in office but their powers are removed. While the company is in the process of being wound up a person cannot perform or exercise, and must not purport to perform or exercise a function or power as an officer (other than a liquidator) of the company, except with the approval of the liquidator or the court.

[27] The learned judge made the second limb of the stay order, validating all dealings and agreements entered into prior to the stay order on the ground that those dealings and agreements are acts for the benefit of the company which are essential in the process of the winding-up. The learned judge further ruled that the second limb of the stay order cannot be said to be in excess of jurisdiction as it is necessary to ensure that all transactions after the winding up process has commenced to be duly validated failing which all steps taken in the course of winding-up proceedings would be subject matter of challenge.

[28] Unfortunately, the learned judge failed to point out under what provision of law or the relevant Act/Rules the said second limb was made. The nearest we can find is s. 236(1)(a) of the Companies Act 1965 which provides "The liquidator may with the authority either of the court or of the committee of inspection – carry on the business of the company so far as is necessary for the beneficial winding-up of the company."

[29] The second limb of the stay order is ambiguous, too wide and too general. It covers "all dealings and agreements entered into by the respondent from the date of the winding-up until the date of the stay order." The court is in no position to be satisfied what the particulars of the dealings and agreements are; whether they are really "necessary for the beneficial winding-up of the company."

[30] It must also be noted the power to carry on such a business under s. 236(1) of the Companies Act 1965 can only be performed and exercised by the liquidator with the authority either of the court or of the committee of inspection, not anyone else, not even the board of directors of the company.

[31] It may be argued that in granting the stay order under s. 243(1) of the Act, the court may impose terms and conditions as it thinks fit. But it must be stressed here that any term and condition imposed must not defeat the purpose of the order itself. If the validation of all previous dealings and agreements is against the universal spirit of a winding-up order and cannot be allowed under the section, then the court cannot impose any term and condition to the same effect under the same section, which may in effect defeat the purpose of the said section.

[32] In effect, the second limb of the stay order has the effect of rescinding or discharging totally the winding-up order perpetually, as if the winding-up order has never been made at all right from the beginning. Without enabling provision to that effect, the second limb of the order cannot be allowed to stand as the effect on commercial reality is adversely far reaching.

[33] In the present case, the respondent has through the second limb of the stay order validated the fire insurance policy which is void as the policy was not obtained by the liquidator, but by the directors. This is clearly not what s. 243 envisaged.

[34] In the UK, the position is different. Until the Insolvency Rules 1986 came into force, a winding-up order could not be rescinded after it had been drawn up. The only remedy was to apply for a stay. The Insolvency Rules 1986 (r. 7.47(1)) which came into force in 1986 changed the position. It provides that "every court having jurisdiction under the Act (Insolvency Act 1986) to wind up companies may review or vary an order made by it in the exercise of that provision". (See: *Re Intermain Properties Ltd* [1986] BCLC 265). Thus after 1986, the court in the United Kingdom is empowered to vary, review, set aside, discharge or rescind a winding-up order and to validate all transactions entered into the company after the winding-up proceedings has commenced. There is no such rule of practice or statutory provision in Malaysia which is equivalent to the UK r. 7.47(1) of the Insolvency Rules 1986.

[35] In Australia, the position is the same as in Malaysia. The relevant provisions of the Australian laws are s. 243(1) of the Companies Act 1961; s. 383 of the Companies Act 1985; and ss. 482-483 of the Corporations Act 1989. The effect of the relevant provisions in Australia is that once a winding-up order has

been made, its descent into dissolution will be prevented only in the unusual event of the court ordering, either an indefinite stay of the winding-up proceedings or termination of the winding-up. The court has inherent jurisdiction to grant a stay but not to validate transactions entered into prior to the stay order (See: *Brinds Ltd v. Offshore Oil LN (No. 2) (supra)* and Ford, *Principles of Company Law* (5th edn. 1990) para. 2207 at p. 770).

[36] In India, the position is the same. In *Shree Chamundi Mopeds Ltd v. Church of South India Trust Association* [1992] 3 SCC 1; ALR 1992 SC 1439 it was held to the effect that the stay operation of a winding-up order means that the winding-up order which has been stayed would not be operative from the date of the passing of the stay order; and it does not mean that the said winding-up order has been wiped out from existence.

[37] In Canada, it has been held that the court has no power to reverse anything done in the liquidation process up to the time of the stay. (See: *Re Red Gold Mining Co* [1950] Que KB 47).

[38] On that ground, this court agrees with learned counsel for the Appellant that such on order (the second limb) was not based on any provision of law and the learned judge had acted in excess of the powers and jurisdiction of the winding-up court; and must be set aside by this court.

[39] The respondent argued that the application for the validation order (the second limb) of the stay order was made under s. 223 of the Companies Act 1965 and O. 92 of the Rules of the High Court 1980. The respondent contended, that the said s. 223 does not state that all acts done by the company or its directors on behalf of the company after the commencement of winding-up are void; instead the section is intended to give powers to the court to validate transactions or dispositions made including payment for contracts made after the commencement of winding-up.

[40] With respect, this court cannot agree with the respondent on this point. Section 223 is totally not applicable to the fact of the present case. It deals with the issue on the avoidance of disposition of property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court. It does not specifically deal with "dealings and agreements entered into by the company after the winding up has commenced".

A

Conclusion

[41] On the above considerations the court finds that the learned High Court judge had erred in making the second limb of the stay order (dated 27 April 2009) which has the effect of totally
B rescinding or discharging the winding-up order perpetually against the contemplation of s. 243 of the Companies Act 1965. We agree that the learned judge has the necessary powers under s. 243 of the Companies Act 1965 to grant a perpetual stay order of the winding-up, but not the power to validate all dealings and
C agreements entered into by the company from the date of the winding-up order until the date of the stay order.

[42] We therefore unanimously allow the appeal with costs of RM10,000 to the appellant. We affirmed the first limb of the stay
D order, but set aside the second limb of the said order.

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